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IN THE

SUPREME COURT

OF THE

UNITED STATES

October Term, 1902.

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THE CREEDE AND CRIPPLE CREEK MINING AND MILLING COMPANY,
Petitioner,

v.

THE UINTA TUNNEL MINING AND TRANSPORTATION COMPANY,
Respondent.

Brief and Argument in Opposition to Petition for Writ of Certiorari.

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In *Forsyth* v. *Hammond*, 166 U. S., 514, the court, reviewing the cases, says:

> "While not doubting its power, has been chary of actions in respect to certioraris."

> "And further, that while this power is co-extensive with all possible necessities, and sufficient to secure to this court a final control over the litigation in all the courts of appeal, it is a power which will be sparingly exercised, and only when the circumstances of the case satisfy us that the importance of the question involved, the necessity of avoiding conflict between two or more courts of appeal, or between courts of appeal and the courts of a State, or some matter affecting the interests of the nation in its internal or external relations demands such relief."

The contention is, that the Circuit Court of Appeals in deciding this cause, announced certain principles of law in direct conflict with the decision of this court in *Calhoun G. M. Co.*, v. *Ajax G. M. Co.*, 182 U. S., 499. That this case involves the identical questions, and facts, passed upon in that case.

The facts in the *Calhoun-Ajax* case are, that the Monarch and Mammoth Pearl lodes were located prior to the location of the tunnel site.

That a receiver's receipt issued for the Monarch and Mammoth Pearl, prior to the location of the tunnel site.

In that case the court passed upon four propositions; three only have any bearing here, in fact, one thereof, is controlling:

1st. Did the Ithica tunnel have a right of way through the Monarch and Mammoth Pearl?

2nd. Did the tunnel acquire by virtue of its location, the ownership to, and right of possession of the blind veins cut therein, etc?

4th. **Whether or not the tunnel owners should have been permitted to introduce evidence for the purpose of showing that there was no discovery of mineral in place in the Monarch and Mammoth Pearl claims, prior to location of tunnel site?**

In that case, all these questions were answered in the negative, and properly, because:

1st. The lode claims in that cause had been segregated from the public domain, before the location of the tunnel.

2nd. The lode claims had been entered for patent by the issuance of a receiver's receipt, before the location of the tunnel.

3rd. The land office at the time of the location of the tunnel, had passed upon every question necessary to make the lode claims valid locations, at which time, no other rights had been initiated.

(*a*) The said department by issuing receiver's receipt decided prior to the issuance thereof, the claims had been properly and legally located

(*b*) That a discovery had been made, (but the time at which said discovery was made, was not decided).

(*c*) That the necessary labor had been performed.

(*d*) That the locators or owners were entitled to enter claims for patent.

4th. The Government had been paid for the land embraced within the surface bounderies of the lode claims by the owners thereof, and as such owners of said claims, they were entitled to own, possess and enjoy the same not only as against the United States, but against the world. All this occurring before the location of the tunnel site.

Under these facts and findings, the Ithica tunnel had no more right to be located across these claims, than it would have to be located upon and across ground that had been patented for years prior to its location.

In referring to the opinion in the *Calhoun-Ajax* case, relative to collateral attack upon decisions of the Land Department, Judge Sanborn, in this case, says:

> "Its decisions of questions within its jurisdiction, are impervious to collateral attack. This was the question which the Supreme Court answered in the Calhoun-Ajax case, and which, if the language in the opinion of that case is *carelessly read, without knowledge of, or reference to the question before the court*, it may seem to be broader, a careful examination of the facts which the record there discloses, demonstrates the proposition, that the decision went no further."

In the *Calhoun-Ajax* case, at the time of the entry of the Monarch and Mammoth Pearl for patent, there were only two parties interested in the claims, the locators thereof, and the United States, as between these parties, the decision of

the Land Department was controlling, thereafter, no one could initiate any title through the United States to these claims.

This cause presents an entirely different state of facts:

1st. The Uinta tunnel was properly and legally located on the 13th day of January, 1892.

2nd. On this date it is contended, there was no location of the Ocean Wave and Little Mary claims, notwithstanding the location certificates bear date, January 2nd, 1892, and that no discovery of mineral had been made in said claims or either of them until long after the location of the tunnel.

A location certificate is not required by the United States Statutes, nor by the statutes of all the States, but in those States in which it is required, it is *prima facie evidence* only of such facts as are required by the statute to be stated in the location certificate.

Lindley on Mines, Vol. 1, p. 502;
Jones on Evidence, Sec. 521;
Campbell v. Rankin, 99 U. S., 261;
Jaulzen v. Arazona Co., 20 Pac., 93;
Pollard v. Shiyeley, 5 Colo., 309.

Lindley on Mines, page 502, in treating of this question, says:

> "Where such record is authorized, it is *prima facie* evidence only of such facts as are required by law to be stated therein, provided they are sufficiently stated. * * *

> While many of the States require the date of the discovery to be stated in the recorded certificate, we do not think that this would be evidence of the *fact* of discovery. A discovery once proven, such a record would, *prima facie* fix the date. The question of discovery is the most important of all the acts required in the proceedings culminating in the perfected location. It is the foundation of the right without which all other acts are idle and superfluous. With the exception of three States (California, Idaho and Montana) the certificate is executed with no solemnity. It is not either acknowledged or sworn to. It is a mere *ex parte* declaration in his own behalf of the party most interested. * * *
>
> The real purpose of the record is to operate as constructive notice of the fact of an asserted *claim* and its extent. When the locators right is challenged, he should be compelled to establish by proof outside of the certificate, all of the essential facts, without the existence of which the certificate possesses no potential validity."

We believe that the authorities are numerous, that the location certificate is not the proper evidence by which to prove the fact of discovery; but at the most, the only claim that is made for it is that such location certificate is *prima facie* proof of the fact.

It is sought by the petitioner to make a location certificate conclusive proof of the fact of discovery and of the date of the same. If there be force in the rule that such certificate is *prima facie* proof, then, by the very meaning of the words "*prima facie*," the respondent was entitled to

introduce evidence to rebut it, and all evidence upon this point was excluded, over the objection and exception of respondent by the trial court. While some degree of sacredness has clung around the patents of the United States, limited however, by the well considered decisions, in which it has been stated that wherever the United States has issued a patent without jurisdiction, the patent is of no more validity than any other instrument which confers no rights. We know of no sacredness which clings round a location certificate made, as had been suggested by a learned author on mining laws, without any solemnity, an *ex parte* proceeding, made by a party who is the most interested one in the entire course of the location. It would be an absurdity if litigation, in which property of great value is involved, should be determined by the *ex parte* acts of the man who is most interested himself; and that, too, at a time when there was no controversy and no reason to controvert in any manner the facts as set out in the location certificate.

The patent is conclusive only of those facts which are necessary in order to procure its issuance. It is not conclusive of any fact which the Land Department is not called upon to pass on. Without a discovery, it would be an impossibility for the Land Department to issue a patent. But the *time of discovery* is not made an essential element in the issuance of it, and cannot therefore be precluded by the issuance. The time of location and the time of discovery is not essential to the issuance of the patent, and is not concluded

thereby. As to discoveries made subsequent to a location, while they validate the claim and relate back to the location, they expressly do so provided no adverse rights intervene.

> Morrison's Mining Rights (10 ed., p. 29 and cases cited).
>
> Lindley on Mines, Vol. 1, p. 454 and note.

In other words, a patent does not live or die with a location, which is set out in the original application as being the date of discovery. But if discovery is made in the claim at any time before the application for the patent is passed upon, and such discovery is proven, a patent may issue therefor, provided the rights of intervening locators are taken care of. So in this case it is not necessary that this patent relate back to the original date of location, as set out in the certificate of location, in order to give effect to the patent. A patent may live and continue to have force with a date set for the actual discovery of the claim very different from that which is contained in the certificate of location. The question is, after all, one of jurisdiction. A judgment can never in effect exceed the jurisdiction of the court. If by law the Land Department, which is given the power to issue such patents, has no right or power to determine the time of location, and if, as in the case of the St. Louis Smelting Company v. Kemp, 104 U. S. 636, the law is as follows:

> "Nor is the doctrine of the conclusiveness of the patent inconsistent with the right of the party resisting it to show, if an entry is not stated in the instrument,

> that no entry of the land is made as an initiatory proceeding."

Then we cannot escape the conclusion that it is not in contravention of any doctrine of conclusiveness regarding a patent, were a party resisting it to show the date of discovery, and to hold otherwise would be to violate the decision of the Supreme Court.

The doctrine of relation is an equitable one, and will only be applied by a court of equity in furtherance of justice to all parties. If our contention is correct, that we are entitled to invoke the law of estoppel against one who knowingly sat by and saw the petitioner expend upwards of one hundred and twenty-five thousand dollars in the improvement of its property, and under the claim of right to go through the property belonging to petitioner, and made no objection, but acquiesced therein, this is certainly an equity in itself, which may be invoked in favor of the relator.

This court, in the case of *Evans* v. *Durango Land and Coal Company*, 25 C. C. A., 532, referring to this equitable doctrine of relation, said:

> "It may be conceded that a patent for public land, has, on several occasions, been held to take effect as of date of the initial step taken by the patentee, under the laws of the United States, to obtain a title to the land. * * * Nevertheless, there appears to be no hard and fast rule giving a patent effect by relation as of a date anterior to the time when an entry is fully consummated by the payment of the purchase money, or by the doing of some other equivalent act, such as the sur-

render of a land warrant, or the selection of land to supply and ascertain deficiency in a land grant. * * * *

The doctrine of relation is a legal fiction, which was invented and is applied solely for the protection of persons who, without fault of their own, would otherwise sustain an injury. Being of equitable origin, and designated to prevent fraud and injustice, it is a doctrine which is never applied when it would have a contrary effect."

3rd. The work was continuous upon the tunnel at all times. The Ocean Wave and Little Mary were entered for patent August 5th, 1893; patent issued, December 21st, 1893. At the time of application for patent, and the entry thereof for the Ocean Wave and Little Mary claims, there was no duty upon respondents to file an adverse.

Enterprise Mining Co. v. Rico-Aspen Mining Co., 167 U. S., 104.

Justice Brewer, in rendering the opinion in that case, says:

"The obvious contemplation of the law in respect to these adverse proceedings is, that there shall be a present *tangible* and *certain right, and not a mere* possibility. Of course the owners of the Vestal claim had notice from the fact of the location of the tunnel line, of the possibilities which future excavations of the tunnel might develope, and so they were not prejudiced by the failure to adverse. And as the defendant could not in any suit which it might institute establish a certain adverse right, and as litigation in the courts is

> based upon facts, and not *upon possibilities*, it seems to us, nothing was to be gained by instituting adverse proceedings and therefore, nothing was lost by a failure so to do."

If, as Justice Brewer says, nothing was lost by failure to institute adverse proceedings, why, we ask, would not respondent be entitled to make the same proof after issuance of patent when the question should arise between the lode claimant, and the owners of the tunnel site, as to whether there was a location of and discovery on the lode claims, the same as could have been offered if the Land Department had not passed upon the questions that petitioner contends estops and precludes respondent from making such proof?

If this controversy had arisen prior to August 5th, 1893, and before these claims were entered for patent, petitioner would not for a moment contend that proof of no location or discovery would not be competent. It would be conceded in such case, that if the proof established no location or discovery, that the tunnel site must prevail.

At the trial of the case, petitioner was not content to rest its case upon the introduction of the patent itself, but as proof of a date to which the patent should relate back, there was introduced the original location certificates of the two claims, and the amended location certificates (printed Rec. 80, fol. 133) and this over the objection of relator, that the location certificate itself was not proof of a discovery. Did petitioner load both the pleadings and proof at the trial of this cause,

with surplusage, or was there a necessity for both the pleadings and proof in this respect? If it was necessary for petitioner to allege, as a separate matter, the date of the discovery, and to prove the same, it was certainly competent for respondent to deny such discovery, and by such proof, as it had at hand, to meet any evidence in respect to the time of location.

There is scarcely any doubt, but what the rights of a patentee, to property obtained from the government, relate back beyond the date of the patent to some prior time. What this time is has been disputed.

Lindley on Mines, Vol. 2, 975, states the rule as follows:

> "It is accepted as a well established rule of law, that the title conveyed by a mining patent relates back to the inauguration of the right; that is, to the location upon which the patent proceedings are based."

Citing as authority therefor:

Haydenfelt v. Daney G. & S. M. Co., 93 U. S., 634;

St. Louis Smelting Co. v. Kemp, 104 U. S., 636;

Deffenbach v. Awake, 115 U. S., 392, 405;

Silver Bow M. & M. Co. v. Clarke, 5 Mont., 378;

Talbot v. King, 6 Mont., 76;

Deno v. Griffin, 20 Nev., 249;

Eureka Case, 4 Saw., 302;

Kahn v. Old Tel. Co., 2 Utah, 174.

Barringer and Adams on the Law of Mines and Mining in the United States, at page 417, state their conclusions as follows:

> "The patent being simply the evidence of the grant, when it had been issued, takes effect by relation as of the first initial step in the acquisition of the title, that is, the original location, at least so far as to cut off intervening rights, unless they be such that the patentee has lost the right to question them by reason of his failure to file adverse claims, as required by Rev. Stat., 2325. Where such rights exist, the relation is to the date of the issuance of the certificate of entry. The date of location may be stated in the instrument, or may appear in the record of the entry in the Department, and may be thus established, or it may be otherwise proven."

Whether, then, the patent, when issued relates back simply to the date of entry, or to the very origin of the rights of the claimant of the property, is immaterial here to us.

In the case of *The Calhoun Gold Mining Company* v. *The Ajax Gold Mining Company, supra*, which was a case appealed from the Supreme Court of the State of Colorado, and which reversed a long line of decisions in reference to cross lodes, there is an opinion covering some five pages dealing with rights of the most vital nature, overturning law, which has been established for many years; and after determining in favor of the defendant in error in that case upon its contention in reference to cross lodes, there is contained, at the end of the decision, the following paragraph:

> "An assignment of error is based upon an offer of plaintiff in error to prove that at the time of the location of the Ithica tunnel site, no ore had been discovered in two of the patented claims of the defendant in error, to wit: the Monarch and the Mammoth Pearl. The ruling was right. The patents were proof of discovery and related back to the date of the location of the claims. The patents could not be collaterally attacked. This has been decided so often, that a citation of cases is unnecessary."

This is the paragraph upon which, in the end, the petitioner contends conflicts with the decision rendered herein.

Patents are a proof of discovery. Patents do relate back to date of location. Patents cannot be collaterally attacked. On these propositions as contained in that paragraph, there can be no dispute. The law upon them has been well settled. But does that paragraph say that the patent is proof of the time of a discovery? Does that paragraph mean that the patents relate back to the date of the location, *as shown by the location certificate*, and that no other proof can be introduced to prove that fact? Does that paragraph mean, when it says that patents cannot be collaterally attacked, that the date of the location, when not shown by the patent itself, cannot be shown by any other evidence outside of the patent? Unless these questions are answered in favor of petitioner, the writ cannot issue.

Not only would it put a strained meaning upon the words used in that decision, to give them such

far reaching effect, but it would override not only a prior decision of the Supreme Court of the United States itself, to wit: the case of the Enterprise Mining Company v. Rico-Aspen Mining Company, *supra*, but it would with scarcely a line, with no authority, and without a reason presented, wipe out a line of well-reasoned and high-standing authorities to the contrary, where the question was a pivotal one, where arguments were heard and the question was determined in the full light of its being an important one. In addition to all that, it would be directly contrary to a learned opinion which was rendered by a court, one of whose members is the very justice who writes the opinion in the Calhoun case, *supra*. The case to which we refer is the case of The Last Chance Mining Company v. The Tyler Mining Company, 61 Fed. R., 557. This case, upon appeal to the Supreme Court, was reversed, but solely upon the question of the admissibility of certain evidence, and as to its effect as *res adjudicata*. No criticism is by the Supreme Court passed upon either the decision or the reasoning of the Circuit Court of Appeals in that case, upon this question of the relation of a patent back to its date of discovery. It was a case in which extra-lateral rights were to be determined by priority of location, and, in the course of its opinion, the court says:

> "Was the patent of the Last Chance conclusive as to the date of the location of the Last Chance claim? * * * The Last Chance thereupon, without objection, introduced witnesses who gave testimony tending to show the date of

discovery and the location, of the Last Chance claim, the staking of the claim, posting notice of location, recording of notice, doing assessment work, survey for patent, etc. The Tyler introduced testimony in rebuttal upon these points, against the objections of the Last Chance. The testimony of the Last Chance tended to show that a valid location of the Last Chance Clance claim was made on the 17th day of September, 1885, three days prior to the location of the Tyler. The testimony in rebuttal tended to show that no location of the Last Chance was made until after the Tyler was regularly located. The patent issued to the Last Chance was, of itself, evidence that the Last Chance lode had been discovered; that the location had been properly made; that it had been marked so that its boundaries could be readily traced; that the statutory requirements in respect to the posting of notice and having it recorded had been complied with; that the necessary amount of work had been done; that the application for a patent, the notices given by the applicant, and all the other steps to acquire a patent, as required by law, had been regularly taken. Counsel for the Tyler admit that the patent itself is evidence of all these facts, and from its date upon its face, it is conclusive in a court of law of all these facts, because without them it could not lawfully issue. The patent is the final judgment and decree of the Land Department that the holder is the owner of the land it embraces, according to its terms, and in a court of law, it is ironclad as title. * * *"

"The controversy between the parties was as to the date when the location of the

Last Chance was made. Was it prior or subsequent in time to the location of the Tyler claim? The patent, does not of itself, fix the date when the location was made. It is silent upon that subject. The respective claims join each other on the surface. There is no conflict between them as to the surface ground. Both claims are valid, and both have the government title—one by patent; the other by a receipt and certificate of entry from the United States Land Office, which, as before stated, is the substantial equivalent of a patent."

"Did the court err in allowing testimony as to the date of the Last Chance location? To what does the title obtained by the patent relate? How is this question to be determined? Is it true that the patent is conclusive of the fact that at the time the application therefor was made, the applicant had a valid location, and had, in all respects, fully complied with the requirements of the mining laws; but it does not fix the time when the location was made. In order to determine this question, it is necessary to introduce evidence independant of the patent. And, in such cases, as is said in Shepley v. Cowan, 91 U. S., 338, the first thing in time in the commencement of proceedings for the acquisition of the title, when the same are regularly followed up, is deemed to be first in right. The law provides when and how adverse claims to an application for a patent may be made; but such controversies are usually confined to conflicting claims as to the surface ground. When there is no conflict on the surface, there is ordinarily no necessity for a protest being made. Where the law does not require a protest to be

made, and an adverse suit to be brought to determine the right to possession, before the patent issues, and a patent is regularly issued and thereafter a controversy arises as to the time when the patent takes effect, and it is claimed that it relates back to the date of the location of the claim, that date if material to the issue raised must be established by evidence in the same manner as any other question of fact not settled by the patent itself."

"The right to a patent once vested is equivalent, so far as the United States Government is concerned, to a patent issued. When issued, the patent relates back to the inception of the right of the patentee. Stark v. Starr, 6 Wall, 403. But where it is sought to make a patent relate back of the date when the application for the patent was made, and *attach itself to some prior right, the facts showing such prior right must be established by proof.*"

"It necessarily follows from this reasoning, that it devolved upon the Last Chance to show the time when a valid location of the Last Chance was made, in order to connect its title by patent with the date when the location of its claim was made."

It was decided in this case:

"The question whether the discovery of minerals in place, were made in the lode claims before or after the location of the claims to the tunnel site was perfected, is open to determination by means of the testimony of witnesses and other competent evidence *de hors* the patent in any litigation between the parties involving their conflicting claims."

> "The averments that no discovery of mineral in place within the lode claims had been made, before the location of the claim to the tunnel site, should not have been stricken from the answer of the defendant, and its evidence to sustain them, should have been received."

All through the brief and argument of the petitioner, for writ of *certiorari*, it is contended and adhered to with a "reasoning that is dangerously absurd," that the facts in the Calhoun-Ajax case, and the one at bar, are identical. Consequently, the law as announced in that case, should have control in this. In view of the many decisions of this court which must necessarily be overruled if the contention of petitioner is sustained, we can not refrain from setting forth in full, the clear, logical, forceable and able construction placed upon the Acts of Congress in reference to tunnel and lode claims rendered by Justice Sanborn in this case.

The decision follows those rendered by this court, and other Federal and State courts. They are all in perfect harmony with the decision complained of.

The logical conclusion to be deducted from reading Justice Sanborn's opinion, compels the judicial mind to stamp it with approval.

The decision above referred to can be found in the 119 Fed. Rep., at pages 164-170, and is as follows:

Statement.

"The writ of error in this case challenges the trial of an issue involving the rights of the respective parties to the action to the possession of the space within the bore of a tunnel where it passes through two lode mining claims beneath the surface of the earth. The Creede and Cripple Creek Mining and Milling Company was the plaintiff and The Uinta Tunnel Mining and Transportation Company was the defendant in the action below, and they will be so styled in this statement and in the opinion which follows. The plaintiff was the owner of two lode mining claims called the Ocean Wave and the Little Mary, which were entered for patent on August 5, 1892, and were patented on December 21, 1893. The plaintiff alleged in its complaint that these claims were duly located and discovered on January 2, 1892. The defendant was the owner of a claim to a tunnel site which extended through these lode claims beneath the surface of the earth and which was located on January 13, 1892. It also owned certain lode claims which had been located on blind veins that had been discovered in the tunnel after the lode claims of the plaintiff had been patented. The mining claims of the plaintiff were between the portal of the tunnel and the defendant's lode claims and the latter had driven its tunnel through the plaintiff's claim and was using it as a way to bring to the surface of the earth the ore it was extracting from its blind veins. The real issue was whether or not the defendant had the right of way along the bore of its tunnel through

the lode claims of the plaintiff, and the determination of this issue depended upon the priority of their respective claims. The plaintiff asserted that its claims were discovered and located on January 2, 1892. The defendant averred that its tunnel was located on January 13, 1892, and that no discovery of mineral in rock in place was made within the lode claims of the plaintiff until after its tunnel site was located. These averments of the defendant were stricken from the answer and the evidence which it offered to sustain them was rejected. Exceptions were taken to these rulings and there was a verdict and judgment for the plaintiff."

SANBORN, Circuit Judge, after stating the case as above, delivered the opinion of the court.

When the claim to a tunnel site has been located before the entry of the conflicting lode mining claims which have subsequently passed to patents, is the question, whether discoveries of mineral in rock in place were made within the lode claims before the location of the claim to the tunnel site, open to determination by means of evidence or testimony *de hors* the patents? This is the principal question presented by this record. If the query were whether or not it is competent to show by proof outside the receiver's receipts or the patents that there had been no location of the patented claims or no discovery of the lodes therein before they were entered for patent, there would be no doubt that a negative answer must be returned to the question, for the reason that this is an issue between the parties to a proceeding be-

fore the Land Department, which that tribunal necessarily considers when it permits the entries of the lands, and its decisions of questions within its jurisdiction are impervious to collateral attack. King v. McAndrews, 111 Fed., 860, 863, 50 C. C. A. 29, 32. This was the question which the Supreme Court answered in Calhoun Gold Mining Co. v. Ajax Gold Mining Co., 182 U. S., 499, 502, 503, 510, and while, if the language of the opinion in that case is carelessly read without knowledge of or reference to the question actually before the court, it may seem to be broader; a careful examination of the facts which the record there discloses demonstrates the proposition that the decision went no further. In that case the receiver's receipts on the lode claims of the appellee had been issued before the claim to the tunnel site was located. (Page 502.) In a proceeding between the lode claimants and the United States, the Land Department had decided that mineral in place had been discovered within the claims and had permitted their entry. Subsequent to this decision and to these entries the owner of the claim to the tunnel site located it across the lode claims and upon the trial offered to prove that there had been no discovery of mineral in place within those claims before they were entered. The trial court rejected the offer. The Supreme Court said:

> "The ruling was right. The patents were proof of the discovery and related back to the date of the locations of the claims. The patents could not be collaterally attacked."

Thus, it may be seen that the only proposition there decided was that one who had initiated no claim upon lands when they were entered by other claimants could not subsequently collaterally attack the decision of the Land Department that there had been a discovery of mineral in place upon the claims at some time before they were entered.

Counsel for the plaintiff rely upon the decision and opinion in this case and insist that it fairly sustains the rulings of the court below. But there are radical and controlling differences between the question presented in that case and the issue of law before us in the case in hand

1. A judgment is binding upon the parties to the proceeding in which it is rendered and upon their privies. The parties to the judgments of the Land Department by which it allowed the entries of the lode claims in the case of the gold mining company were the United States and the owners of those claims. No other parties had or claimed any interest in the land at the time those entries were made. The judgments and the patents accordingly bound and estopped these parties and their subsequent assignees. They estopped all parties who initiated claims upon or interests in the lands under either of the parties to the proceeding subsequent to the judgments of the Land Department. The claimant of the tunnel site in that case initiated his claim under the United States, one of the parties to that proceeding, subsequent to the judgments. It was therefore a privy of the United States and was estopped by the judgments of the

Land Department from proving that no discoveries had been made upon the lode claims before these judgments were rendered. This is not the case in the action before us. The claim to the tunnel site was located on January 13, 1892. The judgments of the Land Department allowing the entries were rendered on August 5, 1892. At that time there were three parties interested in the land, the lode claimants, the United States, and the claimant of the tunnel site. Two of these parties, the lode claimants and the United States. were parties to the proceedings and were estopped by the judgments and the patents. One of them was not a party to any of these proceedings, to the judgments or to the patents, and, upon familiar principles; was neither bound by them nor estopped by them from presenting and proving according to the established rules of evidence in trials under the common law the fact that no discoveries had been made on the lode claims before the location of its tunnel site, the fact essential to the validity of its claim upon, and interest in, the land.

Not only was the claimant of the tunnel site not a party to the proceedings in the Land Department which resulted in the entries and patents to the lode claims, but it was neither required to become such a party nor to submit its claims and interests in the lands to the adjudication of that department at that time because its rights therein were then too uncertain, contingent and intangible for determination. When the applications for the patents of the lode claims were filed, the blind veins which have induced the use of the tunnel

through the lands in controversy had not been discovered, the tunnel had not been driven into the land, and it was impossible to know whether or not the claimant of the tunnel site would ever acquire any right to use this land for the purpose to which it is now devoted. The claimant of a tunnel site is not required by sections 2325 and 2326, Revised Statutes, to file an adverse claim and submit his rights in the lode claims crossed to adjudication by the Land Department upon the filing of applications for patents to those claims when his rights are at that time uncertain, contingent and intangible. Enterprise Min. Co. v. Rico-Aspen Min. Co., 167 U. S., 108, 112; Enterprise Min. Co. v. Rico-Aspen Consolidated Min. Co., 13 C. C. A. 390, 399, 400; 66 Fed., 200, 209, 210.

2. The issue whether the discoveries in the lode claims were made before the location of the tunnel site in the Ajax Gold Mining Company's case was necessarily considered and adjudged by the Land Department when it permitted the entries of the lode claims. The finding that such discoveries had been made before the date of the entries was indispensible to the decision that the lode claimants were entitled to make the entries so that that finding must have been made by the Department. But the location of the tunnel site in that case was subsequent to these entries. Hence the finding that the discoveries were made before the entries was necessarily a finding that they were made before the location of the tunnel site, and it was, as we have seen, binding upon the

claimant of the tunnel site, because it was claiming a right initiated after this adjudication under a party to the judgments.

It is not so in the case before us. The question here is whether or not discoveries were made in the lode claims prior to January 13, 1902, the date of the location of the claim to the tunnel site. The determination of this question was neither indispensible nor material to the adjudication made by the Land Department on August 5, 1892, that the lode claimants were entitled to enter the land, and there is nothing to show that this issue was ever considered or decided by that department in reaching its conclusion. The only question relative to the discoveries that it was required to determine was whether or not they had been made prior to August 5, 1892, when the entries were permitted, and the decision of that question left entirely untouched the issue in this case whether they were made before or after the location of the tunnel site on January 13, 1892.

3. When the entries were made in the Ajax Gold Mining Company's case no claim to a tunnel site had been located or staked upon or across the lode claims, and the entries of them and the patents to them vested the title in the claimants free from any right or claim to a tunnel site.

It is otherwise in the case at bar. The claim to the tunnel site was located and staked out across these lode claims before they were entered. Under the Revised Statutes and the law the entries and patents of these claims vested the title to them subject to the rights of the prior claimant of the

tunnel site just as they vested it subject to the right of an owner of an adjoining lode claim to follow on its dip through a side line and through the patented territory of these lode claimants any vein which has its apex in his claim. Enterprise Min. Co., v. Rice-Aspen Consol. Min. Co., 13 C. C. A., 390, 400; 66 Fed., 200, 210; Mining Co. v. Campbell, 135 U. S., 286, 301; Hall v. Mining Co., Morr. Min. Rep. (3rd ed.), p. 282; Branagan v. Dulaney, 8 Colo., 408, 412; Lee v. Stahl, 9 Colo., 208, 210; Morgenson v. Milling Co., 11 Colo., 176, 179.

While, therefore, it is a flagrant attack upon a patent to attempt to maintain a claim initiated subsequent to the entry on which it rests, it is no such attack to assert the rights of the claimant of a tunnel site located before the entry of the land against a patent of it to a lode claimant, because under the statutes and the law such a patent always issues subject to those rights.

Notwithstanding all these considerations, counsel for the plaintiff insists that the defendant is estopped from pleading and proving that no discoveries of mineral in place were made in the lode claims before the location of the tunnel site on January 13, 1892, because certificates of location of the lode claims were filed on January 2, 1892, which declare that such discoveries were made on that day, and it is a well-settled principle that patents relate back to, and take effect upon, the dates of the initiation of the rights on which they are founded.

But the certificates of location are not conclusive proof of the facts which they recite against those asserting rights adverse to their makers. They are competent evidence of the fact that they were made and filed, and hence of an important link in the chain of the plaintiff's title. But when the existence of the facts which they recite is challenged they are but the *ex parte* statements of interested parties, and there is nothing in them or in their relation to the property or the parties to bind those claiming the lands adversely to their makers or to estop them from establishing the truth by the customary oral and written evidence.

Nor is there anything in the doctrine of relation to work such an estoppel. Grant that the patents relate back and take effect as of the date of the initiation of the lode claims, yet since the patents are subject to the rights of the claimant of the tunnel site when they are issued they are still subject to those rights when they have related back to the inception of the claims upon which they rest.

Moreover, the averment of the defendant is that no discoveries were made in the lode claims until after the location of its claim to the tunnel site. If this allegation is true, it may be doubted whether the lode claims can be said to have been initiated before the claim for the tunnel site was located. "No location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located." Rev. Stat., Sec. 2320; Enterprise Min. Co. v. Rico-Aspen Min. Co., 167 U. S., 108, 112. It is true that subsequent

discoveries may validate earlier locations and that the latter may then inure to the benefit of the locators as against the United States and all parties whose claims were initiated subsequent to the discoveries. But they would inure to their benefit as of the dates of the discoveries and not as of the dates of the locations and they would neither destroy nor affect intervening rights. The marking of boundaries and filing of location certificates may precede discovery or discovery may precede them, but no location is valid until both are complete. The earlier act then inures to the benefit of the locator as of the date of the latter, subject to all rights which have intervened between them. Erwin v. Pergo, 35 C. C. A., 482, 485; 93 Fed., 608, 611; Jupiter Min. Co. v. Bodie Consol. Min. Co., 11 Fed., 666, 676; 4 Morr. Min. Rep., 411, 423; North Noonday Min. Co. v. Orient Min. Co., 1 Fed., 522, 531; Zollars v. Evans, 5 Fed., 172, 175; Strepy v. Stark, 5 Pac., 111, 114; Thompson v. Spray, 72 Cal., 528, 533; Erhardt v. Boaro, 113 U. S., 527, 536. There was, therefore, no valid location of the lode claims until the discoveries within them were made and it is held by the Circuit Court of Appeals of the Ninth Circuit in Last Chance Mining Co. v. Tyler Min. Co., 61 Fed., 557, 565; 9 C. C. A., 613, 621, that a patent for a mining claim only relates back to the time when a valid location was first made. If this is a correct view of the law, the patents in this case could not relate back to a time anterior to the dates of the discoveries, and if those were subsequent to the

location of the tunnel site they could not affect defendant's rights.

If litigation for the possession of the property in controversy in this action had arisen between the lode claimants and the claimant of the tunnel site at a time prior to the entries of the lode claims, the question whether or not discoveries of mineral in place had been made in the lode claims before the location of the tunnel site would have been decisive of the issue, and the testimony of witnesses who knew the facts and other evidence competent in the customary trials of such issues at law would have been admissible to determine the question. What is there in the entries and the patents to deprive the defendant of its rights to try this issue now upon like evidence? Its claim to this land had attached before those entries were made. It was not a party to the proceedings in the Land Department which resulted in the adjudication that the lode claimants were entitled to enter it. It was not required to file an adverse claim and to submit its rights to the adjudication of that department when the applications for the patents were made. The adjudication of the Land Department which permitted the entries was *res inter alios acta* and ineffectual to estop the defendant. The Department was not required to determine, and it did not decide the question here at issue, and under the statutes and the decisions of the Federal courts the entries and the patents were made subject to the rights of the claimant of the tunnel site which had attacked before the Land Department permitted the entries. Our answer to

the question which this case presents is, that when the claim to a tunnel site has been located before the entry of conflicting lode claims, which have subsequently passed to patents, the question whether discoveries of mineral in place were made in the lode claims before or after the location of the claim to the tunnel site was perfected is open to determination by means of the testimony of witnesses and other competent evidence *de hors* the patents in any litigation between the parties involving their conflicting claims, Last Chance Min. Co. v. Tyler Min. Co., 61 Fed., 557, 565-7; 9 C. C. A., 613, 621-623; Champion Min. Co. v. Consolidated Wyoming Gold Min. Co., 75 Cal., 78; Iron Silver Min. Co. v. Campbell, 135 U. S., 286; Davis' Adm'r v. Weibold, 139 U. S., 507.

The averments that no discoveries of minerals in place within the lode claims had been made before the location of the claim to the tunnel site should not have been stricken from the answer of the defendant, and its evidence to sustain them should have been received. The question which has been considered is decisive of the issue whether or not the judgment below should be affirmed, and, as the other questions presented by the assignment of errors may not arise again, they will not now be considered. The judgment below must be reversed and the case remanded to the court below with directions to grant a new trial, and it is so ordered.

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